United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 22,010

502

BERNICE ANTHONY,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The United States District Court
For The District Of Columbia

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ISSUE PRESENTED FOR REVIEW

Whether the doctrine of governmental immunity precludes imposition of liability on the District of Columbia for its alleged failure to furnish proper medical treatment to an inmate of the District of Columbia Jail.

The case, under No. 22,010, was previously before the Court which, on August 9, 1968, dismissed the appeal due to the lack of a final appealable order.

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CASES CITED

UNITED STATES CODE CITED

OTHER AUTHORITY CITED

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*Cases chiefly relied upon are marked by asterisks.

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BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

Bernice Anthony, a former inmate of the District of Columbia Jail (hereinafter "the inmate"), sued the District of Columbia (and others) for damages resulting from an alleged failure of prison officials to provide proper medical treatment for her epileptic condition while in jail.

In her complaint, the inmate alleged that since 1935 she has suffered from chronic epilepsy and requires multiple daily dosages of prescribed medication to control her condition. On November 13,

1964, when she entered the District of Columbia Jail to serve a six-month sentence, the prison officials were fully advised of her epileptic condition and need for medication. For about three weeks after entering the jail, she was provided with her prescribed medication, but the medication was subsequently withheld, causing her to suffer epileptic seizures. It was alleged further that the withholding of medication resulted in an argument and altercation between her and a prison official, after which she was locked in the maximum security detention cell for five days, where she received no medication and again suffered violent epileptic seizures. Following her release from the maximum security detention cell, she was, so it was alleged, strapped to a bed in the District of Columbia Jail infirmary for 17 days "under severe restraints not required for medical attention."

Upon motion of the District of Columbia, the court below dismissed the action as to it on the ground that the doctrine of governmental immunity precluded the imposition of liability. This appeal followed.

ARGUMENT

I

Congress alone may abrogate the doctrine of governmental immunity as it relates to the District of Columbia.

At the outset, the inmate asserts that the doctrine of governmental immunity is archaic and inequitable and suggests its abolition by the Court. It is clear, however, that the inmate is asking the Court to undertake what it has on numerous occasions refused to do.

In Wilson v. District of Columbia, 86 U. S. App. D. C. 28, 30-31, 179 F. 2d 44, 46 (1949), the Court said:

> "* * * [Appellant's suggestion] that this court change the law of this District to make it conform to the Congressional intent as to the general Federal Government's liability for torts free from the defense of governmental immunity, as expressed in the Federal Tort Claims Act * * * should be addressed to the legislature rather than to this court. As stated by Professor Smith in 'Municipal Tort Liability,' 48 Mich. L. Rev. 41, 56, 'Adequate reformation can be achieved only by legislation.' "

And in Calomeris v. District of Columbia, 96 U. S. App. D. C. 364, 366, 226 F. 2d 266, 268 (1955), the Court said:

> "We agree with Judge Holtzoff that the defense of governmental function to a complaint for negligence, mistreatment or malpractice is 'an obsolescent and dying doctrine', but we

> also agree with him that since it is a phase of government immunity Congress alone can replace it. We join in his suggestion that the attention of the Congress might well be directed to it. Congress did not include the District of Columbia Government in the Federal Tort Claims Act." [Footnote omitted.]

Again, in Urow v. District of Columbia, 114 U. S. App. D. C. 350, 351, 316 F. 2d 351 (1963), the Court said:

> "Appellant makes a vigorous attack on the doctrine of sovereign immunity citing cases in which various state courts have judicially modified that ancient doctrine. But this jurisdiction, while having some attributes of the states, is governed by Congress and that body in adopting the Federal Tort Claims Act in 1947 consciously excluded the District from its provisions.[1] We must also take notice that as recently as 1960 the District of Columbia Employee Non-Liability Act, 74 Stat. 519 [D. C. Code, 1967, §§ 1-921 through 1-926], was enacted making a limited modification of immunity as to the operation of vehicles owned or controlled by the District. While the courts of this jurisdiction no doubt have a certain flexibility in interpreting the existing exceptions to the doctrine, general abolition of the rule as it prevails here is not, in light of this background, something to be undertaken by the judiciary. * * * "

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[1] On July 18, 1966, Congress further amended the Federal Tort Claims Act, but again did not include the District of Columbia within its terms. See 28 U. S. C. A. § 2671.

Finally, in Elgin v. District of Columbia, 119 U. S. App. D. C. 116, 117, 337 F. 2d 152 (1964), the most recent decision on the subject, the Court stated:

> "As recently as last year * * * this court reaffirmed a position it had taken earlier, namely, that termination of municipal tort immunity is, insofar as the District of Columbia is concerned, a question to be resolved at the legislative level by the Congress of the United States. * * * Whatever the merits or demerits of this position, a reexamination of it is, under our customary practice, a matter for the full court and not merely a division. * * * "

Accordingly, notwithstanding the criticism of the doctrine of governmental immunity, the applicable rule in this jurisdiction is that "Congress alone can replace it." Calomeris v. District of Columbia, supra.

II

The doctrine of governmental immunity compelled dismissal of the complaint.

The inmate also urges that, in any event, when a prisoner in the District of Columbia Jail is injured due to the negligence of a prison official, the District is not protected by the doctrine of governmental immunity. The applicable cases in this jurisdiction flatly reject this contention.

In District of Columbia v. Totten, 55 App. D. C. 312, 5 F. 2d 374 (1925), the Court noted that, while the District may be held liable if it creates or maintains a nuisance, liability may not be predicated on the negligent operation of a prison. The Court said (55 App. D. C. at 314):

> "Unquestionably the authorities agree that the conduct of a prison for the retention of criminals who prey upon society generally is the performance of a governmental function, in which the public generally is concerned, and in which the police power of the state is exercised. So, as far as the case at bar is concerned,* * * we feel that we are well supported by the great weight of authority in holding that the acts of the District in actually maintaining a prison for the retention of prisoners is the performance of a governmental function. * * * "

And in Jones v. District of Columbia, 51 App. D. C. 319, 279 Fed. 188 (1922), in which a person confined at the Washington Asylum and Jail committed suicide, it was asserted that the District was negligent in "failing to properly guard and watch over * * * [the decedent] while she was in the institution." Concluding the action foreclosed by the doctrine of governmental immunity, the Court said (51 App. D. C. at 320):

> "Appellant's wife was received and treated in the Asylum by the District in the exercise of its governmental or police power. Cities

are not liable to prisoners for injuries sustained by reason of the negligence or carelessness of the officers in charge. 4 Dillon on Municipal Corporations, § 1656, and note. The maintenance of a jail is generally held to be a governmental function. McQuillin on Municipal Corporations, vol. 5, § 2431.

" 'The furnishing of aid to indigent persons and the care of those morally mentally or physically defective, are * * * duties which rest upon the state and which can be classed as governmental in their character. In the carrying out of this function, an immunity is granted in respect to all acts or agencies.' 3 Abbott on Municipal Corporations, p. 2247, § 969.

" 'For the acts and omissions of its officers and agents in the exercise of powers of the former class, such as * * * the power through its board of health or other agency to protect its inhabitants against disease and unsanitary conditions, and to care for the sick, * * * the city, like the state, is not liable to pay damages in civil actions.' City of Winona v. Botzet, 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N.S.) 204."

These decisions appear to reflect the prevailing view with respect to the applicability of the doctrine of governmental immunity in cases involving municipal maintenance and operation of a prison. 18 McQuillin, Municipal Corporations, 3rd ed., revised, § 53.94.

Relying on dictum in Elgin v. District of Columbia, 119 U. S. App. D. C. 116, 337 F. 2d 152 (1964), the inmate asserts that the doctrine of governmental immunity is now available as a defense by the

District only in cases involving an exercise of top-level supervisory discretion. The holding in Elgin, however, was merely that the maintenance of a public school playground is not a governmental function. In reaching this conclusion, the Court relied upon the analogy it found between the unsafe conditions on the school playground and an unsafe condition on a public sidewalk, stating (119 U. S. App. D. C. at 121) that:

> "* * * If we accept, as this court has, the right of a pedestrian on a public sidewalk to get to the jury on his claim of the District's liability in negligence for permitting a depressed area alongside such sidewalk to exist unguarded (Elliott v. District of Columbia, 82 U. S. App. D. C. 64, 160 F. 2d 386 (1947).), we do not see how we can deny the same right on the facts alleged here. From the standpoint of the school child here involved, the school playground was not only a public area which he was privileged to traverse but one in which he was affirmatively required to be at the time of his injury. * * * "

Such an analogy manifestly does not fit the facts of this case. And it is also noteworthy that the activity involved in Elgin had never been accorded the protection of the governmental immunity doctrine by any previous decision of this Court. Cf. 119 U. S. App. D. C. at 120, especially footnote 4. Jones v. District of Columbia, supra, and District of Columbia v. Totten, supra, make plain that this is not true respecting the operation of the District of Columbia Jail.

And the inmate's assertion that Jones v. District of Columbia, supra, can be reconciled with the Elgin dictum is equally untenable. It is clear from the pertinent language in Jones quoted above that the doctrine of governmental immunity was applied, not because the particular action complained of involved an element of discretion, but because in its operation of a jail the District performs a vital public role. In this sense, Calomeris v. District of Columbia, 96 U. S. App. D. C. 364, 226 F. 2d 266 (1955), is significant, since that case too involved alleged negligent medical treatment at a public institution. Yet, in applying the doctrine of governmental immunity in Calomeris, this Court predicated its decision firmly on the public nature of the institution involved, not on whether the act causing injury at that institution constituted an exercise of supervisory discretion by hospital officials. The Court said (96 U. S. App. D. C. at 365):

> "Care for the indigent sick is clearly a governmental function. The purpose of the General Hospital is to care for the indigent sick. In each of the four statutory provisions in which Congress has authorized the admission of pay patients, it has added the phrase 'in so far as such admissions will not interfere with admission of indigent patients.' * * * * " [Footnotes omitted.]

A like rationale is applicable here. Since the governmental immunity doctrine protects the District in operating a public hospital

devoted to the care of the indigent sick, it should likewise protect the District in the operation of a prison designed to detain and rehabilitate the criminal offender. Indeed, if the doctrine of governmental immunity is to have any vitality at all, it is in cases like the instant one in which the indispensable role of the institution involved in a contemporary society can hardly be questioned.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the judgment of the court below is in all respects correct and should, therefore, be affirmed.

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March 31, 1969

UNITED STATES COURT OF APPEALS
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- X

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No. 22,010

REPLY BRIEF OF APPELLANT

The District of Columbia in its brief in the instant case misconstrues Appellant's position. Appellant has argued before the District Court and urges this Court in the alternative that (1) the doctrine of sovereign immunity is obsolete and inequitable and ought to be changed; and (2) that even if the Court chooses not to reach that issue Appellant has stated a proper cause of action in her complaint within the recognized exception to the sovereign immunity bar.

In Appellant's brief the reasons for challenging the sovereign immunity doctrine are detailed. Indeed, this Court frequently

has considered this argument and is well aware of the pros and cons regarding this issue. For this reason Appellant will not belabor them herein.

But it does warrant reemphasizing that Appellant's position is that the misconduct in question resulted from a ministerial and not a discretionary act of an agent of Appellee and that therefore the complaint states a proper cause of action which should not be barred by the doctrine of sovereign immunity.

Appellant wishes to direct this Court's attention to and to rely upon the clear and persuasive articulation of the appropriate rule governing this case in the opinion of Judge Aubrey E. Robinson, Jr. issued on December 12, 1968 in Thomas v. Johnson, Civil Action No. 1370-68. In his opinion in that case, the most recent authority in this jurisdiction on this subject, Judge Robinson, took pains to explain and elucidate the law in the District of Columbia regarding the doctrine of sovereign immunity and the qualifications within that doctrine recognized by the Courts in this jurisdiction. Appellant urges that the present complaint is justified by that opinion.

THEREFORE, Appellant urges this Court to reverse the dismissal of her complaint by Judge Holtzoff below and to reinstate Appellant's complaint and allow her to proceed to trial in the District Court on this issue.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Reply Brief of Appellant has been mailed to counsel for Appellee, David P. Sutton, Esq., Assistant Corporation Counsel, D.C., District Building, Washington, D.C., 20004, this day of April, 1969.

Winifred R. Garcia